IN THE HIGH COURT OF BOMBAY AT GOA, PANAJI-GOA

APPEAL FROM ORDER NO. 5 OF 2003

Floriano Jose Tavares (expired)
Maria Esperdiana De Silva (deceased)
Eddie Tavares.
r/o H.No. 1001, Velim Tolecanto,
Salcete-Goa. .... Appellant

Versus

Jose Tavares Alias Jose Max Tavares
"AU Serene", Next to MariaBambina Convent,
Cuncolim, Salcete-Goa. .... Respondent

Shri M.S. Usgaonkar, Sr. Advocate with Ms. G. Kale, Advocates for the Appellant.

None for the Respondent.

CORAM : **P.V. KAKADE, J.**

DATE : **23rd NOVEMBER, 2006**

ORAL JUDGMENT :

Heard the learned Counsel for the Appellant. None appears for the respondent, though served.

2. This is an appeal preferred against the order passed by the Comarca Judge of Salcete and Quepem at Margao dismissing the application of the appellant and closing and disposing of the Inventory case

in Inventario Proceedings No. 20174/66/Q.

3. The impugned order came in the wake of an application filed by the appellant/interested party, praying that the notice be issued to the cabeca de casal. Notice was accordingly issued for appearance on 20/03/1999. The parties were represented by the Advocates. After hearing both the parties, it was held by the Inventory Court that as per Article 296 of Portuguese Civil Procedure Code, there is 'Desertion' of an instance as envisaged in Article 296 of Portuguese Civil Procedure Code and, accordingly, the instance has been declared as extinct.

4. The inventory was concluded by final partition dated 19/03/1976. First Appeal No. 104 of 1979 was filed in this Court alongwith the Appeal From Orders No. 26 & 27 of 1984 arising from orders passed. Out of them, Appeal From Order No. 27 of 1984 was disposed as not pressed. Main appeals were therefore, Appeal From Order No. 26 of 1984 and First Appeal No. 104 of 1979. By judgment dated 19/01/1985, this Court set aside the final partition and also main order dated 25/06/1975, by which first gift deed executed on 06/03/1936 was declared void, by Inventory Court, was set aside.

5. Therefore, it was submitted that the Inventory had to proceed as if the gift deed dated 06/03/1936 is valid and operative as could be seen from the judgment of this Court dated 19/07/1985. It is also to be noted that this Court while setting aside the order of Inventory Court held that gift deed dated 09/06/1965 though valid may be effected depending upon the fact whether any properties are left from the disposable share. Ultimately, the final partition also came to be set aside. By an order of remand, direction was issued to the Inventory Court to proceed further with the matter. However, there was no direction to the appellant in that case to take any steps.

6. In view of the facts and backgrounds, the learned Counsel for the appellant submitted that the Inventory Court nowhere recorded findings that there was some duty cast on the appellant to present the proceedings and there was inertia on the part of the appellant. It was further submitted that Inventory Court instead of trying to find out if there was any obligation on the part of the Court to process further as per the order of remand, is finding fault with the appellant is not justifiable only because he moved an application and, therefore, it was submitted that the approach of the Inventory Court ought to have been different. The mere fact that the

appellant made an application, does not by itself indicate that there was inertia on the part of the appellant nor the Inventory Court was exonerated from giving effect to the order of remand.

7. In this regard, it would be worthwhile to note Article 291 of the Portuguese Civil Procedure Code which reads thus;

'**ARTICLE 291**'

> The 'Interruption' as envisaged in Article 290 disappears and also its effect, as soon as the Plaintiff declares in the file that he intends the continuation of the same and the notice of such declaration is given to the Defendants who are not ex-parte, but such notice shall have no effect if the Plaintiff does not apply within 48 hrs. for continuation of the proceedings.
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> Sole Paragraph : The notice shall be effective even though the time of prescription has expired or the time for institution of the suit has expired except where some of the Defendants plead prescription or that the period for filing suit has expired before the Plaintiff has made declaration referred to in this Article. In the last case, the Court shall not accept the declaration.

Therefore, the legal consequence of the sole para of Article 291 is a clear indication that substantive right of party is not at all lost, unless time for filing suit has expired if any or prescription is pleaded by the opposite side.

8. The effect of Article 290 as laid down, can be noticed for same proviso.

> "Instance stands Interrupted when proceedings are pending for more than one year in cases of inertia of parties."

Therefore, once the Instance is Interrupted, the effect which Clause 2 of Article 552 of Civil Code gives to service of summons through Court shall cause to have effect or the period of time which has passed earlier is added from the time of filing suit till the moment of interruption. In other words, the combined reading of Article 290, 291 and 296 would lead to irresistible conclusion as follows;

(a) There is no case of interruption at all because there is no inertia on the part of the Appellants.

(b) This was a case of remand and a direction to the Inventory Court and it was for the Inventory Court to take proper steps as per Article 266.

(c) There is no obligation case on the Appellant to take any step.

(d) Without prejudice, it is submitted that in view of sole para of Article 291, the substantive right is not at all lost, even after 'Interruption' or 'Desertion'.

If we take into account, the above noted settled legal position then the reasoning adopted and findings recorded by the learned trial Judge appear

to be incorrect and, therefore, cannot be concurred with. In the result, I hold that the appeal deserves to be allowed and, hence, stands allowed. The impugned order is quashed and set aside. The application filed by the interested party to call for the records of the Inventory Proceedings be allowed and the date be fixed for hearing according to the convenience of the lower Court. With these directions, the appeal stands disposed of with no order as to costs.

P.V. KAKADE, J.

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